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In the Supreme Court of the United States

OCTOBER TERM, 1940.

No. 194.

MARYLAND CASUALTY COMPANY, a corporation,
Petitioner,

vs.

PACIFIC COAL & OIL COMPANY, a corporation,
and JOE ORTECA,
Respondents.

BRIEF OF PETITIONER.

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BRIEF OF PETITIONER.

THE OPINIONS OF THE COURTS BELOW.

The decision of the Circuit Court of Appeals was rendered on April 8, 1940 and appears in the Record at page 16. The opinion of the Circuit Court of Appeals is reported at 111 F. (2d) 214.

The decision of the District Court appears at page 8 of the Record. It has not been reported.

JURISDICTION.

Petition for a writ of certiorari in this case was granted by this Court on the 14th day of October, 1940.

This suit was originally brought in the District Court of the United States for the Northern District of Ohio, Eastern Division, under Sec. 274(d) of the Judicial Code (28 U. S. C. A. 400), which reads in part as follows:

> "(1) In cases of actual controversy except with respect to Federal taxes the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and

other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such."

STATEMENT OF THE CASE.

Petitioner filed its petition for a declaratory judgment, under Judicial Code Section 274 (d), (28 U. S. C. A. 400), against Pacific Coal & Oil Company and Joe Orteca on August 3, 1938 in the District Court of the United States for the Northern District of Ohio, Eastern Division (R. 2).

It is alleged in said petition that there is diversity of citizenship and that the amount involved exceeds Three Thousand Dollars ($3,000.00), exclusive of interest and costs (R. 2).

The petition further alleges that the Maryland Casualty Company issued to the Pacific Coal & Oil Company a policy of liability insurance, under the terms of which the Maryland Casualty Company obligated itself to defend all actions brought against assured and to pay all sums which assured might become obligated to pay for bodily injuries or destruction of property caused by automobiles hired by the assured (R. 2); that on February 24, 1936, while said policy was in full force and effect, a collision occurred between an automobile driven by the defendant, Joe Orteca, and a 1931 Ford owned, not hired, by the Pacific Coal & Oil Company, and operated by an employe of the Pacific Coal & Oil Company; that defendant, Joe Orteca, received personal injuries in said collision and filed suit in the Common Pleas Court of Cuyahoga County in the amount of $25,250.00 to recover therefor (R. 4); that a controversy exists as to whether the 1931 Ford was a hired automobile covered by the terms of the Maryland Casualty Company's policy (R. 4); that the Maryland Casualty Company's obligation to defend said action in the state court depended upon whether or not said 1931 Ford was or was not a hired

automobile within the meaning of the policy. The prayer then asked the court to declare the rights of the parties (R. 5).

The Pacific Coal & Oil Company filed an answer thereto and Joe Orteca, on August 15, 1938, filed a demurrer (R. 6) upon the ground that no cause of action was stated in the petition as against him, and upon the further ground that he was not a proper party. Joe Orteca's demurrer was sustained by the court September 12, 1938 (R. 8) and plaintiff not desiring to plead further, final judgment was entered on October 3, 1938 in favor of Joe Orteca and against the Maryland Casualty Company (R. 9), from which judgment an appeal was taken to the United States Circuit Court of Appeals for the Sixth Circuit (R. 9). In that Court, on the 8th day of April, 1940, the decision of the District Court was affirmed upon the ground that no cause of action was stated against Orteca (R. 15).

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred in affirming the judgment of the District Court which sustained the demurrer of Respondent, Joe Orteca, to the petition.

ARGUMENT.

It is contended by Petitioner that the demurrer interposed by the injured claimant should have been overruled for the reason that Petitioner has a valid cause of action against him under the Federal Declaratory Judgments Act.

1. An Actual Controversy Exists.

That the requisite controversy exists between the parties to this action is apparent from the petition. It sets forth the issuance of an automobile liability policy to the Pacific Coal & Oil Company covering hired automobiles of the latter. It is then averred in the petition that a collision occurred between an automobile driven by the defendant,

Joe Orteca, and a 1931 Ford driven by an employe of the Pacific Coal & Oil Company, as a result of which defendant Orteca received personal injuries and filed suit for the same in the state court. The petition then avers that a controversy exists, involving plaintiff's liability under its policy and its duty to defend the state action now pending, resulting from a dispute as to whether or not the 1931 Ford was a hired car within the meaning of the plaintiff's policy and therefore covered by said policy (R. 4, 5).

By the filing of a demurrer, defendant, Joe Orteca, admitted the matters alleged in the petition.

From the leading case of *Aetna Life Insurance Company vs. Haworth*, 300 U. S. 227, 81 L. Ed. 617, we quote the following language of Mr. Chief Justice Hughes at page 240 (81 L. Ed. 621):

> "The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. * * * It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. * * * Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages."

The *Haworth* case was cited by Judge Magruder in *Maryland Casualty Company vs. United Corporation of Massachusetts, et al.*, 111 F. (2d) 443 (1st Circuit, 1940). The latter case involved a factual situation identical with that in the case at bar. In holding that the District Court erred in dismissing the complaint on the ground of lack of jurisdiction, Judge Magruder had this to say concerning the existence of a "controversy" at page 446:

"We think that the present case presents a 'controversy' within the language of the *Haworth* case. There is a dispute between the parties as to the present contractual obligation of the insurer to defend the Assured in the litigation pending in the state court. If the Assured's claim is well founded, the insurance company will be committing a present breach of contract in failing to defend. If the insurer's claim is correct, it has no obligation to defend, because of non-coverage, and it has no concern over the outcome of the state court litigation because even if the Assured is there held liable he is not entitled to indemnity from the insurer, The plaintiff in the present declaratory judgment action having joined as parties defendant the Assured and the Dunham executors who are suing the Assured for damages in the state court, the federal court is in a position to make 'an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged.' It can determine once and for all (1) that the insurer is, or is not, under an obligation to defend the action in the state court; (2) that the Assured if held liable in that action is, or is not, entitled to indemnity from the insurer under the policy, and (3) that if the Dunham executors obtain a judgment against the Assured in the pending cause of action they will, or will not, be entitled to bring proceedings for equitable attachment against the insurer. This certainly seems to be a controversy 'appropriate for judicial determination.' Many cases have so held, on similar facts. *Maryland Casualty Co. v. Consumers Finance Service, Inc.*, 3 Cir., 101 F. 2d 514; *Central Surety & Insurance Corp. v. Norris*, 5 Cir., 103 F. 2d 116; *United States Fidelity & Guaranty Co. v. Pierson*, 8 Cir., 97 F. 2d 560; *Associated Indemnity Corp. v. Manning*, 9 Cir., 92 F. 2d 168."

At this juncture, it will be profitable to refer to Section 9510-4 of the Ohio General Code, mentioned in the Circuit Court's opinion at page 215. That section reads as follows:

"SEC. 9510-4. *Insurance money applied to judgment, when; insurer as party defendant.* Upon the

recovery of a final judgment against any firm, person or corporation by any person, including administrators and executors, for loss or damage on account of bodily injury or death, for loss or damage to tangible or intangible property of any person, firm, or corporation, for loss or damage on account of loss or damage to tangible or intangible property of any person, firm, or corporation, for loss or damage to a person on account of bodily injury to his wife, minor child or children if the defendant in such action was insured against loss or damage at the time when the rights of action arose, the judgment creditor or his successor in interest shall be entitled to have the insurance money provided for in the contract of insurance between the insurance company and the defendant applied to the satisfaction of the judgment, and if the judgment is not satisfied within thirty days after the date when it is rendered, the judgment creditor or his successor in interest, to reach and apply the insurance money to the satisfaction of the judgment, may file in the action in which said judgment was rendered, a supplemental petition wherein the insurer is made new party defendant in said action, and whereon service of summons upon the insurer shall be made and returned as in the commencement of an action at law. Thereafter the action shall proceed as to the insurer as in an original action at law."

The opinion of Judge Magruder in the case of *Maryland Casualty Company vs. United Corporation of Massachusetts, supra;* did not indicate whether the State of Massachusetts has a statute similar to the Ohio statute cited above. Presumably not, in view of the reference, at page 446 of the opinion, to the injured claimant's right to bring proceedings for equitable attachment against the insured. However, it is submitted that this constitutes a distinction without a real difference between the two cases. The Ohio statute merely gives a successful plaintiff the right to reach an unsuccessful defendant's insurer in the same suit.

2. The State Suit Does Not Bar This Action.

In the following cases the pendency of a suit in the state court between the injured party and the assured was held not to deprive the insurer of its right to a declaratory judgment.

Maryland Casualty Co. vs. United Corporation of Massachusetts, et al., 111 F. (2d) 443 (1st Circuit, 1940);

Central Surety and Insurance Corporation vs. Norris, et al., 103 F. (2d) 116 (5th Circuit, 1939);

Maryland Casualty Co. vs. Consumers Finance Service, Inc. of Pennsylvania, et al., 101 F. (2d) 514 (3rd Circuit, 1938);

United States Fidelity and Guaranty Co. vs. Pierson, et al., 97 F. (2d) 560 (8th Circuit, 1938);

Farm Bureau Mutual Automobile Insurance Co. vs. Daniel, et al., 92 F. (2d) 838 (4th Circuit, 1937);

Ohio Casualty Insurance Co. vs. Gordon, et al., 95 F. (2d) 605 (10th Circuit, 1938);

Western Casualty and Surety Co. vs. Beverforden, 93 F. (2d) 166 (8th Circuit, 1937);

Maryland Casualty Co. vs. Sammons, et al., 99 F. (2d) 323 (5th Circuit, 1938);

Carpenter et al. vs. Edmonson, 92 F. (2d) 895 (5th Circuit, 1937);

American Motorists Insurance Co. vs. Busch, et al., 22 F. Supp. 72 (S. D. Cal., Central Division, 1938).

We also respectfully call the Court's attention to the case of *Ryan v. The Employers' Liability Assurance Corporation, Ltd.*, ... U. S. ....; 84 L. Ed. 1008, the same being case No. 967 of the October, 1939 Term of the Supreme Court of the United States. This was a case involving substantially the same facts as in the case at bar, the only exception being that in the *Ryan* case the injured

claimant had already taken judgment against the assured in the state court. The District Court dismissed the bill. The Circuit Court for the Sixth Circuit reversed the judgment and remanded the case. From the Circuit Court's judgment of reversal, one of the defendants sought a writ of certiorari which was allowed by this Honorable Court at the October Term, 1939.

3. Petitioner Has a Cause of Action Against Joe Orteca.

In *Central Surety and Insurance Corporation vs. Norris, et al., supra,* the injured claimants had previously brought suit in the state court. Their suits were pending at the time that the insurer brought its action for a declaratory judgment. The District Judge sustained a motion to dismiss the claimants who had sued in the state court. In reversing the dismissal and remanding the cause for further proceedings, the court said at page 116:

> "The plaintiffs in the two suits pending in the State court should not have been dismissed. While they have not sued the Insurance Corporation, and are not interested in the question whether the Corporation is bound to defend their suits, yet if they win they will, or at least may, implead the Corporation by garnishment or other means to obtain payment of their judgments. In such case the question whether the policy applies will have to be decided again. It would be very inconvenient if the federal court should, these plaintiffs not being parties, decide that the policy does not apply, and the Corporation should not defend the actions and the plaintiffs should recover and then the State court should decide the policy does apply. The interest of Ruddell and Rosser in the question the Insurance Corporation is trying to get adjudicated by a declaratory judgment is real and substantial though not immediate. They ought to be retained as parties to be heard on it and to be bound by the result. *Central Surety & Ins. Corp. v. Caswell,* 5 Cir., 91 F. 2d 607."

In *Maryland Casualty Company vs. Consumers Finance Service, Inc. of Pennsylvania et al., supra,* the facts

were practically identical with those in the preceding case and the case at bar. In holding that the injured claimants were necessary and proper parties, the court said at page 515:

> "It is settled that a controversy between an insurer and its insured as to the extent of the insurer's responsibility under the insurance policy involves the rights of the insurer and will support a declaratory judgment proceeding. *Aetna Life Ins. Co. v. Haworth,* 300 U. S. 227, 57 S. Ct. 461, 81 L. Ed. 617, 108 A. L. R. 1000; *Columbian Nat. Life Ins. Co. v. Foulke,* 8 Cir., 89 F. 2d 261; *Farm Bureau Mut. Automobile Ins. Co. v. Daniel et al.,* 4 Cir., 92 F. 2d 838; *Western Casualty & Surety Co. v. Beverforden,* 8 Cir., 93 F. 2d 166; *Maryland Casualty Co. v. Hubbard,* D. C., 22 F. Supp. 697. It is equally clear that in such a proceeding involving an automobile liability policy persons injured in the accident in question are necessary and proper parties."

At page 516 the court said:

> "The only question which will arise in the suits by the injured parties against Finance Service, however, is as to the liability of Finance Service to them. The question as to the duty of the Casualty Company to defend will not be involved and cannot be adjudicated in those proceedings. The company is, therefore, entitled to have the extent of the coverage of its policy declared in the present proceeding. We accordingly conclude that the court below exceeded its discretionary power in dismissing the petition for a declaratory judgment."

In *United States Fidelity and Guaranty Company vs. Pierson et al., supra,* the plaintiff company sought a declaratory judgment for its liability under an automobile policy issued to the defendant Shrigley. The defendant Pierson had filed an action in the state court to recover for bodily injuries caused his wife by the operation of the insured automobile. The Circuit Court of Appeals for the Eighth Circuit reversed the ruling of the trial court which

granted the motions to dismiss, holding that the action was properly brought against all of the defendants, including the injured party.

To the same effect, see *Maryland Casualty Company vs. United Corporation of Massachusetts, supra.*

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 194.—October Term, 1940.

Maryland Casualty Co., Petitioner, *vs.* Pacific Oil & Coal Co., and Joe Orteca, Respondents.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[February 3, 1941.]

Mr. Justice Murphy delivered the opinion of the Court.

Petitioner issued a conventional liability policy to the insured, the Pacific Oil & Coal Co., in which it agreed to indemnify the insured for any sums the latter might be required to pay to third parties for injuries to person and property caused by automobiles hired by the insured. Petitioner also agreed that it would defend any action covered by the policy which was brought against the insured to recover damages for such injuries.

While the policy was in force, a collision occurred between an automobile driven by respondent Orteca and a truck driven by an employee of the insured. Orteca brought an action in an Ohio state court against the insured to recover damages resulting from injuries sustained in this collision. Apparently this action has not proceeded to judgment.

Petitioner then brought this action against the insured and Orteca. Its complaint set forth the facts detailed above and further alleged that at the time of the collision the employee of the insured was driving a truck sold to him by the insured on a conditional sales contract. Petitioner claimed that this truck was not one "hired by the insured" and hence that it was not liable to defend the action by Orteca against the insured or to indemnify the latter if Orteca prevailed. It sought a declaratory judgment to this effect against the insured and Orteca, and a temporary injunction restraining the proceedings in the state court pending final judgment in this suit.

Orteca demurred to the complaint on the ground that it did not state a cause of action against him. The District Court sus-

tained his demurrer and the Circuit Court of Appeals affirmed. 111 F. (2d) 214. We granted certiorari on October 14, 1940, to resolve the conflict with the decisions of other Circuit Courts of Appeals cited in the note.[1]

The question is whether petitioner's allegations are sufficient to entitle it to the declaratory relief prayed in its complaint. This raises the question whether there is an "actual controversy" within the meaning of the Declaratory Judgment Act (Judicial Code § 274d, 28 U. S. C. § 400), since the District Court is without power to grant declaratory relief unless such a controversy exists. *Nashville, etc. Ry. Co.* v. *Wallace*, 288 U. S. 249, 259; U. S. C. A. Constitution, Art. III, § 2.

The difference between an abstract question and a "controversy" contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. See *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 239-242. It is immaterial that frequently, in the declaratory judgment suit, the positions of the parties in the conventional suit are reversed; the inquiry is the same in either case. *Nashville, etc. Ry. Co.* v. *Wallace, supra*, p. 261.

That the complaint in the instant case presents such a controversy is plain. Orteca is now seeking a judgment against the insured in an action which the latter claims is covered by the policy, and sections 9510-3 and 9510-4 of the Ohio Code (Page's Ohio General Code, Vol. 6, §§ 9510-3, 9510-4) give Orteca a statutory right to proceed against petitioner by supplemental process

[1] Maryland Casualty Co. *v.* United Corporation, 111 F. (2d) 443; Central Surety & Insurance Corp. *v.* Norris, 103 F. (2d) 116; Maryland Casualty Co. *v.* Consumers Finance Service, Inc., 101 F. (2d) 514; Aetna Casualty & Surety Co. *v.* Yeatts, 99 F. (2d) 665; U. S. Fidelity & Guaranty Co. *v.* Pierson, 97 F. (2d) 560; Associated Indemnity Corp. *v.* Manning, 92 F. (2d) 168. See also, Ryan *v.* Employers' Liability Assurance Corp., Ltd., 109 F. (2d) 690; C. E. Carnes & Co. *v.* Employers' Liability Assurance Corp., Ltd., 101 F. (2d) 739; Standard Accident Insurance Co. *v.* Alexander, Inc., 23 F. Supp. 807; U. S. Fidelity & Guaranty Co. *v.* Pierson, 21 F. Supp. 678; Builders & Manufacturers Mutual Casualty Co. *v.* Paquette, 21 F. Supp. 858; Travelers Insurance Co. *v.* Young, 18 F. Supp. 450; Commercial Casualty Insurance Co. *v.* Humphrey, 13 F. Supp. 174.

and action if he obtains a final judgment against the insured which the latter does not satisfy within thirty days after its rendition. Compare *Maryland Casualty Co.* v. *United Corporation,* 111 F. (2d) 443, 446; *Central Surety & Insurance Corp.* v. *Norris,* 103 F. (2d) 116, 117; *U. S. Fidelity & Guaranty Co.* v. *Pierson,* 97 F. (2d) 560, 562. Moreover, Orteca may perform the conditions of the policy issued to the insured requiring notice of the accident, notice of suit, etc., in order to prevent lapse of the policy through failure of the insured to perform such conditions. *Hartford Accident & Indemnity Co.* v. *Randall,* 125 Oh. St. 581; see also, *Lind* v. *State Automobile Mutual Insurance Association,* 128 Oh. St. 1; *State Automobile Mutual Insurance Association* v. *Friedman,* 122 Oh. St. 334.

It is clear that there is an actual controversy between petitioner and the insured. Compare *Aetna Life Ins. Co.* v. *Haworth, supra.* If we held contrariwise as to Orteca because, as to him, the controversy were yet too remote, it is possible that opposite interpretations of the policy might be announced by the federal and state courts. For the federal court, in a judgment not binding on Orteca might determine that petitioner was not obligated under the policy, while the state court, in a supplemental proceeding by Orteca against petitioner, might conclude otherwise. Compare *Central Surety & Insurance Corp.* v. *Norris, supra,* p. 117; *Aetna Casualty & Surety Co.* v. *Yeatts,* 99 F. (2d) 665, 670.

Thus we hold that there is an actual controversy between petitioner and Orteca, and hence, that petitioner's complaint states a cause of action against the latter. However, our decision does not authorize issuance of the injunction prayed by petitioner. Judicial Code § 265, 28 U. S. C. § 379; see *Central Surety & Insurance Corp.* v. *Norris, supra,* p. 117; *Maryland Casualty Co.* v. *Consumers Finance Service, Inc.,* 101 F. (2d) 514, 516; *Aetna Casualty & Surety Co.* v. *Yeatts, supra,* p. 670.

The judgment of the Circuit Court of Appeals is reversed and the cause is remanded for further proceedings in conformity with this opinion.

Mr. Justice BLACK did not participate in the consideration or decision of this case.